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NO.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAWN BONOMO, JARED BONOMO and SUMER LIN BONOMO,

Petitioners,

-vs-

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE

On January 18, 1980, Respondent, Hartford Accident & Indemnity Company, hereinafter referred to as Hartford, issued a "family automobile policy" to James Bonomo, as named insured. The policy was to be in effect for a three-month period expiring on April 18, 1980. On March 28, 1980 James Bonomo, II, while a resident of the household of James Bonomo, was struck by a hit-and-run motorist. Bonomo died from the injuries sustained in that accident on March 29, 1980. Thereafter, the widow of James Bonomo, II, Petitioner, Dawn Bonomo, made claim with Hartford pursuant to the uninsured motorist coverage afforded under the policy, which claim was submitted on June 13, 1983. Hartford denied the claim and Mrs. Bonomo filed suit on the policy on December 2, 1983.

The Hartford policy provided, in pertinent part, as follows:

> COVERAGE D--UNINSURED MOTORIST (DAMAGES FOR BODILY INJURY): To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom....
>
> "UNINSURED AUTOMOBILE" includes a trailer of any type and means:
> b. A hit-and-run automobile:
>
> "HIT-AND-RUN AUTOMOBILE" means an automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (a) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile".

On the basis of the foregoing policy language, and in accordance with Indiana law as set forth in Bocek v. Inter-Insurance Exchange of Chicago Motor Club, 369 N.E.2d 1093 (1977) the Court granted Summary Judgment in favor of Hartford.

II

SUMMARY OF ARGUMENT

The Indiana Wrongful Death Statute does not violate equal protection or due process as contemplated by the 14th Amendment. The authority cited by the petitioner is inapplicable to that issue. The Indiana Wrongful Death Statute does not create a suspect class. The effect of the Indiana Wrongful Death Statute is not to create a lesser right of recovery than in the case of one who is merely injured as a result of tortious conduct. The anology drawn by petitioner between claims for personal injury and for wrongful death is erroneous.

The ten year contract statute of limitations does not apply to Bonomo's claim for uninsured motorist wrongful death benefits. The claim was filed more than two years after the action accrued, therefore, Bonomo cannot establish that she is "legally entitled to recover" as required by the Hartford policy. The authorities relief upon by Bonomo were rejected in Bocek and are not controlling

authority in Indiana.

The coverage afforded under the Hartford policy is contingent on Bonomo establishing a legal entitlement to recover from an uninsured or hit-and-run motorist. The purpose behind uninsured motorist coverage is to afford the same protection to a person injured by a hit-and-run motorist as he would have enjoyed if the offending motorist were known and had carried liability coverage himself. Were Bonomo to be allowed to sue under the ten year limitation for contracts she would be given a greater right than would have been available were the tortfeasor's identity known and he carried liability coverage. Such a result would also, in effect, rewrite the policy and contravene its clear intent.

The two year time period contained in the Indiana Wrongful Death Statute is a "condition attached to the right to sue". It is a condition precedent to the existence of the claim and is not a statute of limitation. The Bocek

court was correct in characterizing the two year period for bringing wrongful death actions as a condition precedent.

The two year limitation for filing wrongful death actions is a condition attached to the right to sue and, as such, cannot be tolled or waived. Hartford is not in privity with the hit-and-run motorist and there is no rational basis for imputing the omission of the hit-and-run motorist in failing to report the accident to Hartford. The duty of Hartford arises out of its contract and not by reason of any relationship with the hit-and-run motorist. Bonomo had the option to file an action directly against Hartford within the two year limitation period, and failed to do so. There is no viable authority cited by Bonomo in support of her arguments with respect to tolling of the two year period and estoppel.

III

ARGUMENT

Petitioner advances four theories in support of her argument for allowance of writ. For the purpose of orderly response, these theories have been combined in three subsections below.

A. The Indiana Wrongful Death Statute does not violate the 14th Amendment to the Constitution of the United States.

Petitioner argues that the Indiana Wrongful Death Statute is unconstitutional for the reason that it violates the 14th Amendment providing for equal protection and due process, under the law. As authority, petitioner cites Moragne v. States Marine Lines, Inc., 90 S.Ct. 1772 (1970). However, petitioner's reliance on Moragne, supra, is misplaced. In that case, this Court was called upon to consider the question "of remedies under federal maritime law for tortious deaths on state territorial waters", Moragne, supra, at p.1775. That narrow question was answered in the affirmative.

However, the opinion and decision of this Court in that case has no applicability to the issues presented herein. Indeed, as stated in Moragne, supra, "Maritime law had always, in this country as in England, been a thing apart from the common law", Moragne, supra, at p.1780. The Court, in that opinion, gave its approval to the enactment, by the States, of wrongful death statutes intended to afford a remedy for wrongful death where none had previously existed at common law. The Court also made reference to statutes enacted by Congress in the Maritime context, specifically the Death on the High Seas Act and the Jones Act, stating that "The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery", Moragne, supra, at p.1782.

The holding in Moragne, supra, was simply that "an action does lie under general maritime law for death caused by violation of maritime duties", Moragne, supra, at p.1792. The Court in Moragne did not decide that recovery for

wrongful death has become a part of our common law, as contended by the petitioner, but merely held that there was a common law right to recovery for wrongful death under general maritime law.

Petitioner argues, without any cited authority, that the Indiana Wrongful Death Statute violates the 14th Amendment to the Constitution of the United States and contends that an injured person has a greater right of recovery than one who dies as a result of his injuries. Clearly, an action for personal injury and an action for wrongful death contemplate entirely different classes of claimants:

> "It is true that the harms to be assuaged are not identical in the two cases: In the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him--usually spouse and children--seek to recover for their total loss of one on whom they depended." Moragne, supra, at p.1779.

It is well settled that equal protection of the laws requires that all persons shall be

treated alike under like circumstances and conditions; Hartford Steam Boiler Inspection and Insurance Co. v. Harrison, 57 S.Ct. 838; Colgate v. Harvey, 56 S.Ct. 252; State Board of Tax Commissioners v. Jackson, 51 S.Ct. 540. Clearly, the analogy which petitioner attempts to draw between claims for personal injury and those for wrongful death is erroneous.

B. The ten year contract statute of limitations is inapplicable to petitioners' claim for uninsured motorist coverage. The two year period for bringing a wrongful death action is a condition attached to the right to sue and is not a statute of limitation.

Bocek, supra, involved a set of facts identical to those presented by the case at bar and is dispositive. There, as here, the issue present concerned

> "Whether uninsured motorist coverage is available to one filing a claim more than two years after the wrongful death of the insured." Bocek, supra, at p.1094.

There, as in the instant case, claim was made for uninsured motorist coverage as the result of the death of the decedent more than

two years prior to the filing of the action. In Bocek, supra, the trial court granted Summary Judgment based upon the provisions contained in the contract and the provisions of the Indiana Wrongful Death Statute, I.C. 34-1-1-2. There, as here, the policy provided for uninsured motorist benefits where the insured established a legal entitlement to recover. The Court in Bocek, supra, affirmed Summary Judgment in favor of the insurer on the ground that the claim was filed more than two years after the death giving rise to the claim, i.e. the wrongful death of the decedent, and therefore, the insured could not establish that she was "legally entitled to recover" pursuant to the terms and provisions of the policy.

> "In short, in the case at bar legally entitled to recover involved more than a mere showing of fact but includes the right to recover on an uninsured motorist endorsement pursuant to meeting the condition of the wrongful death Statute. (citation omitted) When a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements such as with uninsured motorist coverage the parties are presumed to have entered into their agreement with reference to the statute.

> (citations omitted) Appellant's right to recover against the deceased's insurer under the uninsured motorist endorsement is derivitive and conditional. Unless she is "legally entitled to recover damages" for the wrongful death of Cooper from the uninsured motorist, the contract upon which she sues precludes her from recovery against the Appellees...Appellant filed her Complaint on February 14, 1974. More than three years had passed since the accident occurred in which Aubrey Cooper died. The statute allowing for recovery for wrongful death had expired within that time period. Since Appellant's legal right to recover was based thereon it is clear that her cause of action expired with it." Bocek, supra, at pp.1097-1098.

As in Bocek, Bonomo attempts to draw an analogy between an action for personal injury and her claim for wrongful death and argues that the coverage provided is not based on whether or not one survives an accident but rather whether or not one is injured as a result of an accident. However, in so doing, she ignores the policy requirement that she be "legally entitled to recover". As stated by the Court in Bocek:

> "However these factors cannot be isolated to avoid the contingent characteristics of the coverage. I.C. 1971, 27-7-5-1, supra, does not create a new right in the plaintiff to sue an uninsured motorist; it merely provides a new procedure whereby such plaintiff may recover his loss against his own insurer. (citations omitted) Thus any action on the contract is inescapably tied to the legal liability of the uninsured motorist. Without this liability, recovery is barred since the right to recover contemplated by the statute stems from the right of action against a tort-feasor." Bocek, supra, at p.1096.

Although "hit-and-run" coverage is not required by the Indiana Uninsured Motorist Statute and is in fact greater coverage than that which is required by law, the rational for such coverage, as set forth in Bocek, is equally applicable to this case:

> "However, it must be remembered that the purpose behind uninsured motorist coverage and the statute which require the same is to afford the same protection to a person injured by the uninsured motorist as he would have enjoyed if the offending motorist had himself carried liability insurance." Bocek, supra, at p.1097.

In line with this reasoning, the Court in Bocek, went on to state, in affirming Summary

Judgment in favor of the insurer:

> "Any hardship occasioned by such a result is no greater than it would be for any person failing to bring his wrongful death action pursuant to the statute. Moreover if Bocek were allowed to sue under the ten year limitation for contracts she would in effect be given a greater right than would have been available to her were the tortfeasor covered by ordinary liability insurance." Bocek, supra, at p.1098.

It is well settled, in Indiana, that the two year time period within which an action must be commenced is a "condition attached to the right to sue" and that this two year time period is not a statute of limitation but a condition precedent to the existence of the claim; General Motors Corp. v. Arnett, 418 N.E.2d 546 (1981). The Court, in Bocek, correctly outlined the rationale and history behind our Wrongful Death Statute and the two year limitation period:

> "This statutory creation of the right to sue in cases involving a wrongful death is intended to provide for the financial loss suffered by the widow, children or next of kin because of the death of the person involved. It was specifically enacted to

> to overcome the result occasioned by adherance to the old English case of Baker v. Bolton (citation omitted)....Furthermore since the right is statutory, that portion which requires that the cause should be brought within two years is considered a condition attached to the right to sue and is not merely a statute of limitation. (citation omitted) As such it cannot be construed as a defense to an action which a defendant may interpose or waive, but it is a condition of the statute imposing liability." Bocek, supra, at pp. 1096-1097.

Any comparison between the wording of the two year limitation contained in the Wrongful Death Statute and that contained in the statute of limitations for personal injury, as contended by Bonomo, is wholly irrelevant. The Indiana Court, in Bocek, did not wrongly characterize the two year period for bringing wrongful death actions.

C. The two year limitation period for filing a wrongful death action cannot be tolled/ Hartford is not estopped from pleading the two year time limitation contained in the wrongful death statute.

Petitioner argues that Hartford should be bound by the hit-and-run driver's failure to

report the accident as required by Indiana law. She argues that Hartford stands in the shoes of the hit-and-run driver and, therefore, somehow must be bound by his actions. This argument is without merit, as stated in Bocek: "The duty of the insurer to pay damages arises solely out of its contract with its insured and not by reason of any special relationship between the insurer and the uninsured motorist", Bocek, supra, at p.1096. In support of her argument, Bonomo cites St. Clair v. Bardstown Transfer Line, 221 S.W.2d 679 (1949), a Kentucky case which was decided in the context of a direct action against the tortfeasor who had concealed his identity. This case is patently distinguishable from the facts at bar and offers little guidance in deciding the issues presented. As pointed out by the Indiana Court, in Bocek, the duty of the Hartford must arise out of its contract and not because of any relationship with the hit-and-run driver. Hartford was not in privity with the hit-and-run driver and there are no facts which might tend to establish some

relationship whereby the omission of the hit-and-run driver in failing to report the accident could be imputed to Hartford. Petitioner misses the point when she argues that the two year period for filing the wrongful death claim should be tolled, or in the alternative, Hartford should be estopped from raising the two year period by way of defense and ignores the clear policy language that an insured be "legally entitled to recover" from the hit-and-run driver. Her options were clearly set forth in Indiana Insurance Co. v. Noble, 295 N.E.2d 419 (1970), as follows:

> "Under the relevant case law the insured-claimant who has a claim against an uninsured motorist has the following options open to him:
>
> 1. He may file an action directly against his insurance company without joining the uninsured motorist as a party defendant and litigate all of the issues of liability and damages in that one action.
>
> 2. He may file an action joining both the uninsured motorist and the insurance company as party defendants and litigate all of the issues of liability

and damages in that action.

3. He may file an action against the uninsured motorist alone without joining the insurance company as a party defendant and litigate the issues of liability and damages. In such case he gives preliminary and adequate notice of the filing and pendency of such action to the insurance company so that they may take appropriate action including intervention.

4. He may file an action against the uninsured motorist and give no notice to the insurance company.

Noble, at pp.432-433.

Clearly under the guidelines set forth in Noble, Bonomo could have exercised option 1 and brought action directly against Hartford pursuant to the terms and provisions of the policy. This, for whatever reason, she chose not to do. As stated in Noble, "there can be no question that under options 1 and 2 the insurance company is bound by the determination of the issues of liability and damages....", Noble at p.433.

Bonomo does not cite any authority in Support of these propositions. Likewise, the

doctrine of equitable estoppel should not be available to one who has rested on her rights in excess of three years since the action accrued. As set forth in Bocek, the two year period for bringing a wrongful death action is a condition attached to the right to sue and as such, cannot be construed as a defense which can be interposed or waived. It is a condition which must be satisfied before there can be a liable claim for wrongful death. Bonomo failed to satisfy this condition precedent and her claim, therefore, is nonexistent.

V

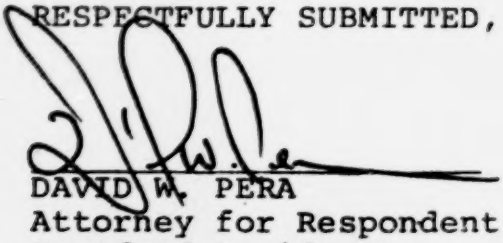
CONCLUSION

There is no question that the Indiana Wrongful Death Statute is constitutional and does not violate equal protection or due process.

The ten year contract statute of limitations is inapplicable to Bonomo's claim, pursuant to Bocek, supra. The two year period for bringing wrongful death actions is a condition precedent to the existence of the claim, Arnett and Bocek, supra. There is no rational basis for tolling that two year period nor does the doctrine of equitable estoppel apply. Bonomo's claim for wrongful death arose on March 29, 1980. She did not file suit against Hartford, for wrongful death uninsured motorist coverage, until December 2, 1983, more than three (3) years after the occurrence which gave rise to her claim. She could have made claim and brought suit against the Hartford for those benefits at any time

within the two year period, pursuant to Noble, supra. Having failed to do so, her right of action for wrongful death against Hartford was extinguished two years after the occurrence. The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,



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PROOF OF SERVICE

I hereby swear under the penalties of perjury that on the 12 day of November, 1985, I served upon the opposing counsel of record in the above-entitled cause one (1) copy of the Brief in Opposition to Petition for Writ of Certiorari by depositing the same in the U.S. Mail, first class postage prepaid, addressed as follows:

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